Filed 12/5/08 P. v. Mansfield CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RYAN C. MANSFIELD, Defendant and Appellant.	G040102 (Super. Ct. No. 05NF01050) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Thomas J. Borris, Judge. Affirmed as modified.

Harry Zimmerman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Pamela Ratner Sobeck and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

THE COURT:[*]

The trial court calculated appellant Ryan C. Mansfield's presentence credits at 15 percent thinking, incorrectly as we discuss below, that the conduct credit limitation imposed by Penal Code section 2933.1 applied. They do not. Accordingly, we will direct the trial court to recalculate appellant's presentence credits at 50 percent pursuant to Penal Code section 4019.

I

In 2006, appellant Ryan C. Mansfield pleaded guilty to two counts of aggravated assault after he and several friends left a party under the influence of alcohol and seriously beat up two strangers they met. (Pen. Code, § 245, subd. (a)(1).) He also admitted the great bodily injury enhancement. (Pen. Code, § 12022.7, subd. (a).) The court suspended imposition of sentence and placed Mansfield on three years formal probation.

A little more than a year later, Mansfield admitted violating probation by driving while under the influence of alcohol. In imposing sentence the court, on its own motion under Penal Code section 1385, subdivision (c)(1), and over the prosecution's objection, struck "for the purposes of sentencing, the enhancement filed under Penal Code section 12022.7, subdivision (a)." It stated the "reason the court is striking the 12022.7 is the defendant in the original case voluntarily acknowledged wrongdoing at an early stage of the criminal process." The trial court sentenced Mansfield to the low term of two years in prison on each count, to run concurrently.

Pertinent here, the court found Mansfield had 500 days actual and 75 days good conduct credits. Defense counsel objected to the calculations of presentence credits. He argued Mansfield was entitled "to 50 percent credits as opposed to 15 percent credit" because the court struck the great bodily injury enhancement. "I understand this

[*] Before Sills, P. J., Rylaarsdam, J., and O'Leary, J.

court states that there's published opinion from another District that states that even [] though the court under 1385 strikes the GBI, it is still 15 percent. I believe that there is a case from this District—and I forgot to bring the case with me—that, though not published, states that if this court under 1385 strikes the GBI then Mr. Mansfield would be entitled to 50 percent credits."[1] The court impliedly overruled the objection.

II

On appeal, Mansfield challenges only the trial court's calculation of presentence credits.

Penal Code section 4019 provides a prisoner may earn two additional days of credit for every four days in custody by satisfactorily performing assigned labor and complying with reasonable rules and regulations. Under this rule, conduct credit may be earned at the rate of 50 percent of the actual period of confinement unless an exception applies. (*In re Reeves* (2005) 35 Cal.4th 765, 768.) Penal Code section 2933.1, subdivision (c) is such an exception. It provides that notwithstanding Penal Code section 4019 the maximum credit that may be earned against the period of confinement may not exceed 15 percent for any person who is convicted for a felony listed in Penal Code section 667.5, subdivision (c).

Mansfield argues that aggravated assault is not listed as a violent felony under Penal Code section 667.5, subdivision (c). It is only the addition of the great bodily enhancement that makes the crime a violent felony (Pen. Code, § 667.5, subd. (c)(7)) and, once the enhancement is stricken, sentencing for that crime is not subject to the 15 percent credit limitation. The Attorney General concedes the point because, as our

---

[1] Although the record is silent, we assume the two cases referenced by defense counsel are the Second District, Division Six's opinion in *In re Pacheco* (2007) 155 Cal.App.4th 1439 and this court's unpublished opinion in *People v. Nguyen* (May 25, 2007, G038109). We remind trial counsel that opinions not certified for publication, even those from this court, "must not be cited or relied on by a court or a party in any other action." (Cal. Rules of Court, rule 8.1115(a).)

Supreme Court held in *Reeves*, "Section 2933.1(a) limits to 15 percent the rate at which a prisoner convicted of and serving time for a violent offense may earn worktime credit, regardless of any other offenses for which a prisoner is simultaneously serving a sentence. On the other hand, section 2933.1(a) has no application to a prisoner who is not actually serving a sentence for a violent offense; such a prisoner may earn credit at a rate unaffected by the section. [Fns. Omitted.]" (*In re Reeves*, *supra*, 35 Cal.4th at p. 780.) Given the great bodily injury enhancement was stricken, Mansfield was not serving a sentence for a violent offense as defined by the statute and thus he was entitled to earn conduct credits at the "unaffected" rate of 50 percent.

To the extent the trial court may have relied on *In re Pacheco*, that case is clearly distinguishable. There, the appellate court held that the 15 percent credit limitation applied because the court struck the punishment but did not strike the enhancement. "Having decided to afford leniency in this case, the sentencing court had two options. It could either strike the enhancement allegation in its entirety or strike the additional three-year punishment for the enhancement specified in section 12022.7, subdivision (a). Here, the trial court chose the latter option. The fact of the enhancement, however, remained. In criminal law jargon, the offense remained 'a 273.5 with a GBI.' Petitioner was still a 'person . . . convicted of a felony offense listed in subdivision (c) of Section 667.5' and could 'accrue no more than 15 percent of worktime credit . . . .' (§ 2933.1, subd. (a).) The admission of the enhancement served to recharacterize the substantive offense as a violent felony under section 667.5, subdivision (c)(8). (See generally *People v. Shirley* (1993) 18 Cal.App.4th 40, 46.) It is the conviction, and not the punishment, that is determinative. Therefore, petitioner is only eligible to earn credits at a maximum of 15 percent in accordance with section 2933.1 . . . ." (*In re Pacheco*, *supra*, 155 Cal.App.4th at pp. 1444-1445.)

In the case before us, the court expressly struck the enhancement. It chose, to mimic *Pacheco's* language, the former option. Because the great bodily injury

enhancement rather than the punishment was stricken, *Pacheco* is not dispositive of the issue. Mansfield is therefore entitled to receive conduct credits at the rate of 50 percent, and the court's calculation of credits based on a 15 percent formula was error. (*In re Reeves*, *supra*, 35 Cal.4th at p. 780.)

III

The judgment on appeal is affirmed as modified. The matter is remanded to the superior court with directions to recalculate the presentence credits consistent with the views expressed herein, prepare a new abstract of judgment, and immediately forward a certified copy of the abstract of judgment to the Department of Corrections and Rehabilitation.